

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/CS/HB 1519 Concurrent Child Custody  
**SPONSOR(S):** Criminal & Civil Justice Policy Council; Civil Justice & Courts Policy Committee; Glorioso and others  
**TIED BILLS:** None **IDEN./SIM. BILLS:** CS/SB 1888

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	<b>REFERENCE</b>	<b>ACTION</b>	<b>ANALYST</b>	<b>STAFF DIRECTOR</b>
1)	Civil Justice & Courts Policy Committee	10 Y, 0 N, As CS	DeZego	De La Paz
2)	Health Care Services Policy Committee	6 Y, 0 N	Preston	Schoolfield
3)	Criminal & Civil Justice Policy Council	11 Y, 0 N, As CS	DeZego	Havlicak
4)	Policy Council	22 Y, 0 N, As CS	Hogge	Hogge
5)				

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### SUMMARY ANALYSIS

This bill amends ch. 751, F.S., to authorize a court to order concurrent custody of a minor child to an extended family member. This bill provides that in order to bring a proceeding for concurrent custody, a person must be:

- An extended family member who has signed, notarized consent of the child's legal parent; or
- An extended family member who is caring full time for the child in the role of a substitute parent and with whom the child is presently living.

A person is eligible to obtain concurrent custody under this bill if he or she:

- Is eligible to obtain temporary custody of a minor under ch. 751, F.S.;
- Currently has physical custody of the child;
- Has had physical custody of the child for no less than 10 days in any 30-day period within the last 12 months; and
- Does not have signed, written documentation from a parent that is sufficient to enable the custodian to do all necessary things to care for a child available to custodians under s. 751.05, F.S.

The bill provides that if one of the child's parents objects, in writing, to a petition for concurrent custody, then the court may not grant the petition, even if the other parent consents, in writing, to the entry of the order. The court must give the petitioner the option of converting the petition to a petition for temporary custody. If the petitioner chooses to do so, then the matter shall be set for further hearing after providing notice to the parent. If the petitioner refuses to convert the petition, then the petition for concurrent custody will be dismissed without prejudice.

Under the bill, an order granting concurrent custody may not eliminate or diminish the custodial rights of the child's parent. The order must expressly state that the grant of custody does not affect the ability of the child's parent to obtain physical custody of the child at any time. This bill provides that the petitioner or the parent of the child may petition the court at any time to modify or terminate the order granting concurrent custody. The court must terminate the order upon a finding that one or both of the parents objects to the order. The termination of a concurrent custody order does not preclude any person who is otherwise eligible to petition for temporary custody. This bill provides that the court may modify an order for concurrent custody if the parties consent and modification is in the best interests of the child.

This bill appears to have a minimal indeterminate negative fiscal impact on state expenditures.

**This document does not reflect the intent or official position of the bill sponsor or House of Representatives.**

**STORAGE NAME:** h1519g.PC.doc  
**DATE:** 4/17/2009

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background**

##### Kinship Care

The Child Welfare League of America (CWLA)<sup>1</sup> defines kinship care as “the full time care, nurturing and protection of children by relatives, members of their tribes or clans, godparents, stepparents, or any adult who has a kinship bond with a child.”<sup>2</sup> The CWLA notes that “one of the most recent stunning changes in the child welfare system has been the major growth in the number of children in state custody who are living with their relatives.”<sup>3</sup>

In the United States, more than six million children -- approximately 1 in 12 -- are living in households headed by grandparents or other relatives.<sup>4</sup> In many of these homes, grandparents and other relatives are taking on the primary responsibility for the child's needs, without either of the child's parents present in the home.<sup>5</sup> The increase in recent years in the numbers of children living with relatives can be attributed to many factors, including:

- Increased reporting of abuse and neglect;
- Change in drug usage and addiction related to the spread of crack cocaine and other drugs;
- Increased levels of poverty;
- More children affected by HIV/AIDS;
- More parents struggling with physical and mental health problems;
- Family violence and parental incarceration; and
- Decline in the availability of traditional foster homes.<sup>6</sup>

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<sup>1</sup> The Child Welfare League of America, founded in 1920, “provides direct support to agencies that serve children and families, improving the quality of the services they provide to more than nine million children every year.” Child Welfare League of America, About CWLA: Fact Sheet, <http://www.cwla.org/whowhat/more.htm> (last visited February 18, 2009).

<sup>2</sup> Child Welfare League of America, Kinship Care: Fact Sheet, <http://www.cwla.org/programs/kinship/factsheet.htm>. Last accessed March 16, 2009.

<sup>3</sup> *Id.*

<sup>4</sup> American Ass'n of Retired Persons, State Fact Sheets for Grandparents and Relatives Raising Children (Oct. 2007), [http://www.grandfactsheets.org/state\\_fact\\_sheets.cfm](http://www.grandfactsheets.org/state_fact_sheets.cfm). Last accessed March 16, 2009.

<sup>5</sup> *Id.*

<sup>6</sup> Child Welfare League of America, *supra* note 2.

In Florida, 258,952 children live in grandparent-headed households, which accounts for 7.1 percent of all the children in the state.<sup>7</sup> There are another 86,152 children living in households headed by other relatives, accounting for 2.4 percent of all the children in the state.<sup>8</sup> Of the children living in households headed by grandparents or other relatives, 151,492 are living there without either parent present.<sup>9</sup> Although many children living with relatives are doing so pursuant to a court order after being adjudicated dependent pursuant to ch. 39, F.S.,<sup>10</sup> far more are living with relatives in informal arrangements, with no court involvement, often because their parents are incarcerated or addicted to drugs.<sup>11</sup>

In response to the growing needs of children living in kinship care homes in Florida and the many grandparents and other relatives who are providing the primary care for them, the University of South Florida's School of Social Work established the Kinship Support Center (Center).<sup>12</sup> According to its website, the Center:

- Develops, maintains, and strengthens support groups for kinship caregivers and their children;
- Collaborates with the community to develop new, innovative services to address the needs and concerns of the kinship care family;
- Researches and develops techniques for working with children, kinship caregivers, biological parents, school systems, local and state service provider agencies, and the community;
- Serves as a statewide clearinghouse of kinship care information obtained at local, state, and federal level of government for service providers and caregivers;
- Provides training for service provider agencies, universities, and kinship caregivers;
- Provides direct services to kinship caregivers throughout Florida by means of the Kinship Care Warmline, a statewide listening line; and
- Provides direct services to children living in kinship care families through a school-based intervention pilot project.<sup>13</sup>

Section 39.5085, F.S., establishes the Relative Caregiver Program through which relatives who care for dependent children are eligible for financial assistance within available funding limits.<sup>14</sup> Chapter 39, F.S., however, does not otherwise explicitly require that relatives<sup>15</sup> be involved in or informed of child protective investigations or dependency proceedings, unless they are legal custodians of the subject child or children.<sup>16</sup> Florida law provides several means by which a relative may be granted some measure of control over a child.

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<sup>7</sup> American Ass'n of Retired Persons, GrandFacts, Florida (Nov. 2007), <http://www.grandfactsheets.org/doc/Florida%2007%20New%20Template.pdf>. Last accessed March 16, 2009.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> In December 2008 in Florida, there were 8,406 children adjudicated dependent and in out-of-home care, who were placed with relatives. Julie Mayo, DCF Staff Analysis and Economic Impact House Bill Number 381 (January 21, 2009).

<sup>11</sup> See generally Judge Tracy Sheehan, Relative Caregiver Legislative Priority 2007 (April 3, 2008) (on file with the Senate Committee on Children, Families, and Elder Affairs). See also, James P. Gleeson, Kinship Care Research and Literature: Lessons Learned and Directions for Future Research, KINSHIP REPORTER VOL. 1, NO. 2 (Summer 2007), available at <http://www.cwla.org/programs/kinship/kinshipsummer2007.pdf>. Last accessed March 16, 2009.

<sup>12</sup> Pursuant to a contract that ends June 30, 2009, the Departments of Children and Family Services and Elder Affairs provides the Center with \$400,000 in funding per year, as well as a designated program liaison. According to the Center, all of its statewide programs will cease when this funding ceases. Anne L. Strozier, Ph.D., M.S.W., Director, Florida Kinship Center, University of South Florida, Florida Kinship Center, Keeping Families Together (presentation to the Senate Committee on Children, Families and Elder Affairs) (February 4, 2009).

<sup>13</sup> School of Social Work, Univ. of South Florida, Kinship Support Center, <http://www.cas.usf.edu/~krisman/>. Last accessed March 16, 2009.

<sup>14</sup> The average Relative Caregiver payment is \$263 per month per child; the average foster care board rate is \$461 per month per child. DCF, DCF Quick Facts 6 (October 20, 2008).

<sup>15</sup> Pursuant to s. 39.01(63), F.S., "relative" means a grandparent, great-grandparent, sibling, first cousin, aunt, uncle, great-aunt, great-uncle, niece, or nephew, whether related by the whole or half blood, by affinity, or by adoption. The term does not include a stepparent.

<sup>16</sup> Section 39.502(17), F.S., requires reasonable notice of dependency proceedings to all "participants." Section 39.01(5), F.S., defines a "participant" for purposes of a shelter, dependency, or termination of parental rights proceeding as "any

## Temporary Custody of Minor Children by Extended Family

Chapter 751, F.S., establishes a process by which a child's extended family member<sup>17</sup> may petition a court for temporary custody of the child. An award of temporary custody allows an extended family member with physical custody of a child to consent to:<sup>18</sup>

- Reasonable medical and dental treatment (including nonemergency surgery and psychiatric care);
- Obtain medical, educational and other records;
- Make decisions about a child's education; and
- Do other things necessary for the child's care.

Temporary custody of a child may be awarded to a relative with or without the consent of the child's parents.<sup>19</sup> If the child's parents do not object, the court will award temporary custody to the petitioning relative when it is in the best interest of the child to do so.<sup>20</sup> If the parents do object, the court may enter a temporary custody order only after finding by clear and convincing evidence that the parents are unfit and have abused, neglected, or abandoned the child.<sup>21</sup> At any time, a parent may petition the court to terminate a temporary custody order, and the court will terminate the order upon a finding that the parent is fit or upon the consent of the parties.<sup>22</sup>

### Consent to Medical Care of a Minor

Section 743.0645, F.S., authorizes the following individuals to consent to the medical care or treatment of a minor if, after a reasonable attempt, a person who has the power to consent (e.g., a parent) cannot be contacted by the treatment provider:

- A person who possesses a power of attorney to provide medical consent for the minor;<sup>23</sup>
- A stepparent;
- A grandparent of the minor;
- An adult brother or sister of the minor; or
- An adult aunt or uncle of the minor.

"Medical care and treatment" includes ordinary and necessary medical and dental examination and treatment, including blood testing, preventive care including ordinary immunizations, tuberculin testing, and well-child care, but does not include surgery, general anesthesia, provision of psychotropic medications, or other extraordinary procedures for which a separate court order, power of attorney, or informed consent as provided by law is required.

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person who is not a party but who should receive notice of hearings involving the child, including the actual custodian of the child, the foster parents or the legal custodian of the child, identified prospective parents, and any other person whose participation may be in the best interest of the child." A relative will meet this definition only if he or she is the current or potential placement for the child.

<sup>17</sup> An extended family member is defined in s. 751.011, F.S., as a relative within the third degree by blood or marriage to the parent, or the stepparent of a child if the stepparent is currently married to the parent of the child.

<sup>18</sup> Section 751.01(3), F.S.

<sup>19</sup> Section 751.05, F.S.

<sup>20</sup> Section 751.05(2), F.S.

<sup>21</sup> Section 751.05(3), F.S.

<sup>22</sup> Section 751.05(6), F.S.

<sup>23</sup> A power of attorney executed after July 1, 2001, to provide medical consent for a minor includes the power to consent to medically necessary surgical and general anesthesia services for the minor unless such services are excluded by the individual executing the power of attorney.

## Guardianship of a Minor

Section 744.3021, F.S., allows a parent, brother, sister, next of kin or other interested person to petition a court for the appointment of a guardian for a minor, without the need for adjudication of incapacity. Once appointed, the guardian has the authority of a plenary guardian.<sup>24</sup>

A child who has been adjudicated dependent pursuant to ch. 39, F.S., may be placed by court order in a permanent guardianship<sup>25</sup> or in a permanent placement with a relative.<sup>26</sup> In both circumstances the court is required to provide the caregiver with a separate order establishing the caregiver's authority to care for the child.

## Power of Attorney

Section 709.08(1), F.S., defines a durable power of attorney to be "a written power of attorney by which a principal designates another as the principal's attorney in fact." Pursuant to a durable power of attorney, the attorney in fact "has full authority to perform, without prior court approval, every act specifically enumerated in the durable power of attorney."<sup>27</sup> If authority is specifically granted, the attorney in fact may make health care decisions on behalf of the principal.<sup>28</sup> A durable power of attorney survives the principal's incapacity.

There is no specific provision in Florida law for a power of attorney that allows someone other than a parent or legal custodian to care for a minor child, although nothing in the law precludes the execution of such a document. Some states have passed legislation that specifically addresses the use of a power of attorney to allow a parent to delegate temporary caregiving authority to a relative.<sup>29</sup>

## **Effect of Bill**

This bill amends ch. 751, F.S., to authorize a court to order concurrent custody of a minor child to an extended family member. This bill defines concurrent custody to mean that an eligible person is awarded custodial rights to care for a child concurrently with the child's parent or parents. This bill provides that in order to bring proceedings for concurrent custody, a person must be either:

- An extended family member who has signed, notarized consent of the child's legal parent; or
- An extended family member who is caring full time for the child in the role of a substitute parent and with whom the child is presently living.

A person is eligible to obtain concurrent custody if he or she:

- Is eligible to obtain temporary custody of a minor under ch. 751, F.S.;
- Currently has physical custody of the child;
- Has had physical custody of the child for no less than 10 days in any 30-day period within the last 12 months; and
- Does not have signed, written documentation from a parent that is sufficient to enable the custodian to do all necessary things to care for a child available to custodians under s. 751.05, F.S.

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<sup>24</sup> Pursuant to s. 744.102(9)(b), F.S., a plenary guardian is "a person who has been appointed by the court to exercise all delegable legal rights and powers of the ward after the court has found that the ward lacks the capacity to perform all of the tasks necessary to care for his or her person or property."

<sup>25</sup> Section 39.6221, F.S.

<sup>26</sup> Section 39.6231, F.S.

<sup>27</sup> Section 709.08(7)(a), F.S.

<sup>28</sup> Section 709.08(7)(c), F.S.

<sup>29</sup> See, e.g., Ariz. Rev. Stat. s. 14-5104 (2008); Cal. Fam. Code s. 6550 (2009); Tenn. Code Ann. s. 34-6-301, et. seq. (2008).

### Petition for Concurrent Custody

This bill requires that, in addition to all the requirements for a petition for temporary custody, a petition for concurrent custody must include:<sup>30</sup>

- The time periods within the last 12 months within which the child has resided with the petitioner;
- The type of document, if any, provided by the parent to enable the petitioner to act on behalf of the child;
- The services or actions that the petitioner is unable to obtain or undertake without an order of custody; and
- Whether each parent has consented in writing to the entry of an order of concurrent custody.

In addition, a copy of the written consent and any other documents provided by the parent to assist the petitioner in obtaining services must be attached to the petition.

The petition must also include the following information currently required to file a petition for temporary custody:

- Any temporary or permanent orders for child support;
- Any temporary or permanent order for protection entered on behalf of or against either parent, the petitioner, or the child;
- Why it is in the best interests of the child for the petitioner to have concurrent custody; and
- A statement on the length of time for which the petitioner is requesting temporary custody, including a statement of the reasons supporting that request.

### Order for Concurrent Custody

This bill provides that, as in the case of a hearing on a petition for temporary custody, the court must hear evidence concerning the child's need for care, all matters required in the petition, and any objections or other testimony the child's parent may present if present. Unless the minor child's parents object, the court must award concurrent custody to the petitioner if it is in the best interests of the child. If one of the child's parents objects to a petition for concurrent custody, in writing, the court cannot grant the petition even if the other parent consents. The court must give the petitioner the option of converting the petition to a petition for temporary custody. If the petitioner chooses to do so, then the matter will be set for further hearing after providing notice to the parent. If the petitioner refuses to convert the petition, then the petition for concurrent custody will be dismissed without prejudice.

An order granting concurrent custody may not eliminate or diminish the custodial rights of the child's parent or parents. The order must expressly state that the grant of custody does not affect the ability of the child's parent to obtain physical custody of the child at any time. The bill provides that the petitioner or either or both parents of the child may move the court at any time to modify the child support provision or terminate the order granting concurrent custody. The court must terminate the order upon a finding that one or both of the parents objects to the order. The termination of a concurrent custody order does not preclude any person who is otherwise eligible to petition for temporary custody. This bill provides that the court may modify an order for concurrent custody if the parties consent and the modification is in the best interest of the child.

As in the case of the order granting temporary custody, this bill provides that an order for concurrent custody may not include an order for child support unless the parent has received personal or substituted service of process, the petition requests child support, and there is evidence of the parent's ability to pay. The bill allows an order granting concurrent custody, like an order granting temporary custody, to redirect all or part of an existing child support obligation to the extended family member who is granted custody of the child.

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<sup>30</sup> Section 751.03, F.S., provides that a petition for temporary custody (not concurrent custody) requires a showing of consent or a description of the acts or omissions of the parents which demonstrate abuse, abandonment, or neglect.

**B. SECTION DIRECTORY:**

Section 1 amends s. 751.01, F.S., relating to the temporary custody of a minor child by extended family.

Section 2 amends s. 751.011, F.S., relating to definitions.

Section 3 amends s. 751.02, F.S., relating to determination of temporary custody proceedings.

Section 4 amends s. 751.03, F.S., relating to a petition for temporary or concurrent custody.

Section 5 amends s. 751.05, F.S., relating to order granting temporary or concurrent custody.

Section 6 provides an effective date of July 1, 2009.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

This bill appears to have a minimal indeterminate negative fiscal impact. See Fiscal Comments.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

To the extent that individuals under this bill will be able to petition for concurrent custody, this bill may increase the judicial workload.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

#### IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On April 14, 2009, the Policy Council adopted a "strike-all" amendment to the CS/CS and reported the bill favorably. The "strike-all" amendment made numerous technical changes and restated and relocated several provisions without any substantive effect.

On March 19, 2009, the Civil Justice & Courts Policy Committee adopted a strike-all amendment to the bill. The strike-all amendment conformed to CS/SB 1888, provided grammatical and technical changes, and clarified that a finding of abuse, abandonment, or neglect is not necessary for granting concurrent custody of a child. The bill was then reported favorably. This analysis is drafted to the bill as amended.

On March 31, 2009, the Criminal & Civil Justice Policy Council adopted one strike-all amendment to the bill. The strike-all amendment made the following changes:

- Provided that an order of concurrent custody can only be issued if at least one of the child's parents consents in writing to the entry of the order;
- Provided that the order cannot be entered if one of the parents objects in writing;
- Added requirements for more information to be provided on a petition for concurrent custody; and
- Provided that a person is eligible to obtain concurrent custody if he or she:
  - Is eligible to obtain temporary custody;
  - Currently has physical custody of the child;
  - Has had physical custody of the child for no less than 10 days in any 30-day period within the last 12 months; and
  - Does not have signed, written documentation that is sufficient to enable him or her to do all of the things necessary to care for the child which are available under an order in s. 751.05, F.S.

The bill was then reported favorably. This analysis is drafted to the bill as amended.